81-5329

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAVID LIVINGSTON FUNCHESS,

PETITIONER,

- V -

STATE OF FLORIDA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
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(MEMBER OF THE BAR OF THIS COURT)

QUESTIONS PRESENTED

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QUESTION #1

WHETHER STANDARDLESS APPLICATION OF A MITIGATING CIRCUMSTANCE THAT "THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY" THAT BY STATUTE IS ONE OF SEVERAL FACTORS TO BE DETERMINATIVE OF THE SENTENCE CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN A SENTENCE OF DEATH IS IMPOSED.

and

WHETHER ARBITRARY APPLICATION FROM CASE TO CASE OF THE SAME MITIGATING FACTOR, RESULTING IN PREJUDICIAL APPLICATION TO THE PETITIONER, VIOLATES THE EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT. 3

QUESTION #2

WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE FOR THE STATE TO PLACE THE BURDEN ON THE DEFENDANT TO PROVE BEYOND A REASONABLE DOUBT THAT HIS IS NOT A DEATH PUNISHABLE CRIME. 7

QUESTION #3

WHETHER THE SUPREME COURT OF FLORIDA HAS FASHIONED ADEQUATE RELIEF FOR VIOLATIONS OF GARDNER v. FLORIDA,

and

WHETHER THE SUPREME COURT OF FLORIDA HAS ENGAGED IN RUBBER-STAMP REVIEW OF DEATH SENTENCES RE-IMPOSED BY TRIAL JUDGES. 10

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is reported as Funchess v. State, 399 So.2d 356 (Fla. 1981), and is set forth in Appendix D. The motion for rehearing and the denial thereof are set forth in Appendix E.

JURISDICTION

Review is sought pursuant to 28 U.S.C. § 1257(3). Rehearing was denied below by the Supreme Court of Florida on June 30, 1981 (Appendix E).

CONSTITUTION & STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1975), which is set forth in Appendix A. It involves the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On July 18, 1975, two death sentences were imposed upon petitioner by the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida (Appendix F). By its opinion in Funchess v. State, 341 So.2d 762 (Fla. 1977), cert. den. 434 U.S. 78 (1977), the Supreme Court of Florida upheld the sentences (Appendix B). Because of a violation of Gardner v. Florida, 430 U.S. 349 (1977), the death sentences were vacated and the case remanded for resentencing by the judge. Funchess v. State, 367 So.2d 1007 (Fla. 1979).

On December 6, 1979, two death sentences were again imposed upon petitioner by the trial judge (Appendix G). These sentences were again upheld by the Supreme Court of Florida (Appendix D).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner argued in the trial court and on appeal that the failure of the trial or appellate court to find that petitioner had no significant history of prior criminal activity, a mitigating circumstance as defined by Section 921.141(6)(a), Florida Statutes (1975), rendered his death sentence unconstitutional, in violation of the Eighth Amendment to the United States Constitution. Petitioner argued in the appellate court that the jury was improperly instructed concerning the burden of proof of aggravating and mitigating circumstances, in violation of the Fourteenth Amendment to the United States Constitution. Petitioner argued on appeal that his death sentences were unconstitutional if they were upheld only upon a cursory review by the Supreme Court of Florida.

REASONS FOR GRANTING WRIT

QUESTIONS PRESENTED

Question #1

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER STANDARDLESS APPLICATION OF A MITIGATING CIRCUMSTANCE THAT "THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY" THAT BY STATUTE IS ONE OF SEVERAL FACTORS TO BE DETERMINATIVE OF THE SENTENCE CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN A SENTENCE OF DEATH IS IMPOSED,

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WHETHER ARBITRARY APPLICATION FROM CASE TO CASE OF THE SAME MITIGATING FACTOR, RESULTING IN PREJUDICIAL APPLICATION TO THE PETITIONER, VIOLATES THE EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT.

The death sentences imposed upon petition at the resentencing resulted from findings that certain aggravating factors were present in the case and that one mitigating factor existed, to wit: that petitioner was under the influence of extreme mental and emotional disturbance at the time of the commission of the capital crimes (Appendix G).

The sentencing judge found inapplicable the mitigating factor found in Section 921.141(6)(a), Florida Statutes (1975) that "The defendant has no significant history of prior criminal activity." Thus, the sentencing decision was made without regard to that mitigating consideration (Appendix G 3-4).

The mitigating factor of lack of a significant history of prior criminal activity has been applied in a standardless manner by the courts of the State of Florida resulting in substantial prejudice to this petitioner. In Proffitt v. State, 315 So.2d 461, 466, (Fla. 1975), aff'd, 428 U.S. 242 (1976) the Supreme Court of Florida approved a finding that one previous conviction for breaking and entering without permission was sufficient to negate the mitigating factor. However, examination of certain other decisions reveals the standardless and arbitrary application of that same mitigating factor.

In Salvatore v. State, 366 So.2d 745 (Fla. 1978), the same court held that a conviction for one burglary, for which the defendant received probation, is not a significant history of prior criminal activity. In Hargrave v. State, 366 So.2d 1 (Fla. 1978), the same court held that prior criminal activity not resulting in a conviction is not to be considered as significant. On the other hand, in Ross v. State, 386 So.2d 1191 (Fla. 1980), the court found "petty offenses" (Boyd, J., dissenting at 1198) to constitute significant criminal activity.

Most recently, in Combs v. State, ____ So.2d ____ (Fla. S.Ct. Case #59,425, Opinion filed July 30, 1981) (slip opinion at 4), the court approved a finding that:

> The trial court determined that 'the defendant, who is twenty years of age, had no significant history of prior criminal activity although he had previously pled guilty to third degree burglary and had been placed on probation for two years' and that the defendant, thoughout the day prior to the murder, had, by his own account, consumed alcoholic beverages and indulged in cocaine.

Petitioner, DAVID LIVINGSTON FUNCHESS, was denied any mitigating consideration of the same mitigating factor by the sentencing court although petitioner had not previously been convicted of a felony nor ever been sentenced to prison (Appendix G 3-4).

Although in State v. Dixon, 283 So.2d 1 (Fla. 1973), the court set some guidelines for utilization by sentencing courts of the statutory mitigating factor at issue here, that standard has been abandoned in application of the law in Florida. In State v. Dixon, supra, at 9 the court stated:

> As to what is significant criminal activity, an average man can easily look at a defendant's record, weigh traffic offenses on the one hand and armed robberies on the other, and determine which represents significant prior criminal activity. Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance.

It is plain from analysis of the above cases that any standard which may have existed originally has been negated by application of the statute in petitioner's case. Consistency by the sentencer is essential to constitutional application of a death penalty procedure. In Godfrey v. Georgia, 446 U.S. 420, 423 (1980), the Court stated that the issue was whether a broad and vague construction of an aggravating circumstance in Georgia's capital sentencing law had been adopted that violated the Eighth and Fourteenth Amendments. The court so found in citing to Furman v. Georgia, 408 U.S. 238 (1972), "that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, supra, at 427.

The Florida death penalty scheme was upheld as facially constitutional in Proffitt v. Florida, 428 U.S. 242 (1976), where this court noted that the Florida Supreme Court held as its function to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached in another case . . . ." Id. at 251. The abdication of that function in the present case controverts the notion that Florida does not engage in "only cursory or rubber-stamp review of death penalty cases . . . ." Id. at 259.

If, as stated by the Florida Supreme Court in State v. Dixon, supra, that anyone can tell the difference between petty offenses and a significant prior history of criminal activity, then this petitioner's death sentence rests upon an impermissible basis because it has been imposed by a procedure that has failed to eliminate a high risk of arbitrary application by virtue of the absence of adequate standards to ensure uniformity and consistency in application of the controlling legal criteria. Since death is presumed to be the proper sentence under Florida law upon proof of the existence of a

single aggravating circumstance, the application of the mitigating factors required by the statute to be considered must meet the same standards of consistency applicable to use of the aggravating factors in determining a proper sentence. Thus the decision in Godfrey v. Georgia, supra, should apply equally to application of the statutory mitigating factor which petitioner has asserted throughout these proceedings that he is entitled to have considered by the sentencer in determining a proper sentence for his crimes.

In his petition for rehearing filed in the Florida Supreme Court, petitioner prayed consideration by that court of the fact that the mitigating circumstance of lack of a significant prior history of criminal activity would have established that he was not a career criminal who would be unamenable to correction by society. Since the death penalty represents the utter rejection of rehabilitation, the rational and consistent application of statutory guidelines is required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioner prays this Court will issue its writ of certiorari to review the decision of the Supreme Court of Florida.

Question #2

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER IT IS CONSITITUTIONALLY PERMISSIBLE FOR THE STATE TO PLACE THE BURDEN ON THE DEFENDANT TO PROVE BEYOND A REASONABLE DOUBT THAT HIS IS NOT A DEATH PUNISHABLE CRIME.

Petitioner submits that the instruction given to his jury at the penalty phase of his capital trial violates the Fourteenth Amendment to the United States Constitution as interpreted in Mullaney v. Wilbur, 421 U.S. 684 (1975). Petitioner's jury was instructed as follows concerning its recommendation of whether petitioner should be sentenced to death or to life imprisonment:

> The aggravating and mitigating circumstances must be proved beyond a reasonable doubt.

In Mullaney, this Court held that the Due Process Clause of the Fourteenth Amendment prohibited a state from placing the burden on the accused to bear the burden of persuasion, and risk of non-persuasion, in order to reduce the crime and the punishment to a lesser degree. In the present case, petitioner met the burden of production of evidence and does not complain of the burden to produce mitigating evidence. However, petitioner asserts, as he did below, that the constitution forbids placing upon him the same burden that is placed upon the state as prosecuting party. Petitioner was saddled with the burden of proving that his evidence in mitigation proved the existence of mitigating circumstances beyond a reasonable doubt. Moreover, the instruction that the jury, upon finding a single aggravating circumstance, should then determine whether mitigating circumstances which were proved were sufficient to outweigh aggravating circumstances resulted in placing the ultimate burden upon the petitioner in exactly the same manner that this declared unconstitutional in Mullaney v. Wilbur.

In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), it was held that Florida's capital sentencing law, Section 921.141(5) and (6), Florida Statutes (1973) defines the category of capital crimes to which Florida's death penalty may be applied. As such, the statutory elements, although defined as sentencing criteria, a part of the state's required proof for imposition of a death sentence. The court likewise held in the same case that aggravating circumstances must be established beyond a reasonable doubt. Id. The court did not hold that migitating circumstances must be established beyond a reasonable doubt, and to that extent the instructions given to the trial jury in this case were erroneous under both Florida law and federal law. However, the Supreme Court of Florida affirmed this death sentence and totally rejected the arguments petitioner has made concerning the fundamentally erroneous instructions to his jury

at the sentencing phase of the trial.

The shifting of the burden to the defendant to bear the burden of persuasion as to the degree of culpability and punishment erodes the basic premise of due process of law under our constitution that the burden of proof on the ultimate matters to be proved always remains with the state in criminal matters. Hankerson v. North Carolina, 432 U.S. 233 (1977) held that the decision in Mullaney is fully retroactive. Accordingly, it is applicable to this case.

The failure of the Supreme Court of Florida to apply the fundamental principle at issue here should warrant granting of the within petition for certiorari review of the decision below.

Question #3

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SUPREME COURT OF FLORIDA HAS FASHIONED ADEQUATE RELIEF FOR VIOLATIONS OF GARDNER v. FLORIDA,

and

WHETHER THE SUPREME COURT OF FLORIDA HAS ENGAGED IN RUBBER-STAMP REVIEW OF DEATH SENTENCES RE-IMPOSED BY TRIAL JUDGES.

Petitioner was originally sentenced to death by a trial judge who based his sentence in part upon consideration of a non-disclosed presentence investigative report. In Funchess v. State, 367 So.2d 1007 (Fla. 1979), petitioner's death sentences were vacated and the cause was remanded to the trial court for resentencing. The trial court reimposed death sentences but upon dramatically different findings of fact. The present death sentences rest upon fewer aggravating circumstances, and the trial judge found the presence of one mitigating circumstance while the original death sentences were imposed upon a finding that no mitigating circumstances existed. The aggravating circumstances found by the court in support of the present death sentences are that the capital felonies were committed during commission of a robbery, that the capital felonies were committed for the purpose of avoiding lawful arrest and that the capital felonies were "heinous, atrocious and cruel" (Appendix G-6-8). The mitigating circumstance found by the trial court at resentencing was that the defendant suffered from extreme mental and emotional disturbance at the time of the capital crimes (Appendix G-4). Thus, originally the court found four aggravating circumstances (Appendix F-8-10) while at the resentencing the court found three such circumstances. At the original sentencing the trial court found no mitigating circumstances (Appendix F-5-7) while at the resentencing the court found the existence of one mitigating circumstance under Florida's statute.

Depsite the significantly different findings of fact, the Supreme Court of Florida gave these re-imposed death sentences less than the full review to accorded death sentences under Proffitt v. Florida, supra, and State v. Dixon, supra. The Florida Supreme Court regards the scope of review on appeal from a Gardner remand at which the death sentence is re-imposed as a limited review, consisting solely of determining whether the trial judge complied with the remand order. Dougan v. State, 398 So.2d 439 (Fla. 1981). As stated by the Supreme Court of Florida in its decision below, the scope of review is technically limited. The court stated in Funchess v. State, 399 So.2d 356, 357 (Fla. 1981):

> The only proper question now presented is whether there is substantial competent evidence to support the express findings of the trial judge that sentences of death are appropriate for Funchess. We are satisfied from our review of the evidence presented at the resentencing procedure, and from the record of the original sentencing proceeding: first, that the trial judge properly performed his weighing function with respect to the one new mitigating circumstance developed at the resentencing proceeding and the aggravating factors which had been established at the original proceeding (all but one of which were unchallenged on remand); and second, that there was substantial and competent evidence to support the findings of the trial judge with respect to the aggravating and mitigating circumstances articulated in his resentencing order.

If the new sentencing hearing is not a "full blown sentencing proceeding" then the new death sentence suffers infirmities identified in Furman v. Georgia, supra. That that is exactly what the Florida Supreme Court Court has said -- that the resentencing proceedings is not a full new sentencing hearing. See Dougan v. State, supra, at 400.

Thus, the relief fashioned by the State of Florida pursuant to Gardner v. Florida is inadequate because neither the resentencing hearing nor the review of the newly imposed death sentence meets the standards articulated in Proffitt v. Florida, supra, because neither the sentencing proceeding itself nor the review by the Florida Supreme Court are adequate to afford the defendant an adequate opportunity to be heard as to why he should not receive the death penalty. As Justice McDonald of the Florida Supreme Court stated, dissenting, in Dougan v. State, supra, at 441:

> Just because it is the same as a prior affirmed sentence does not necessarily make this one correct; it must pass constitutional muster on its own.

Since petitioner could not be heard in either the trial court or the appellate court concerning the propriety of the sentence, could not have legal issues decided affecting that sentence and could not challenge the jury's death recommendation even on grounds of fundamental constitutional error, this court should grant certiorari to determine whether the relief fashioned by the State of Florida and the procedure employed for violations of Gardner v. Florida, is sufficient to erase the constitutional error that affected the decision to impose death as the sentence.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

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SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States has been furnished by U.S. mail to the Honorable Michael Rodak, Jr., Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. David Livingston Funchess, #047886, Florida State Prison, Post Office Box 747, Starke, Florida 32091; and by hand-delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 25 day of August, 1981.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

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CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.
921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.
921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
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921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19504, 1939; CGL 1940 Supp. 8663(264); s. 121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19504, 1939; CGL 1940 Supp. 8663(267); s. 122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SEN-

TENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19054, 1939; CGL 1940 Supp. 6663-246; s. 119, ch. 70-339; s. 1, ch. 72-72; s. 3, ch. 72-724; s. 1, ch. 74-379.
*Note.—Bracketed word inserted by the editors.
Note.—Former s. 919.23.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 260a, ch. 19554, 1939; CGL 6426, 6427; CGL 1940 Supp. 6663-270; s. 123, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits, shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

History.—s. 261, ch. 19054, 1939; CGL 1940 Supp. 6663-271; s. 124, ch. 70-339.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.—

(1) A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence.

(2) In addition to other credits, a person sentenced to imprisonment in custody of the '[Department of Offender Rehabilitation] shall receive credit on his sentence for all time spent between sentencing and being placed in custody of the '[Department of Offender Rehabilitation]. When delivering a prisoner to the '[Department of Offender Rehabilitation], the sheriff shall certify in writing to the '[department]:

(a) The date the sentence was imposed and the date the prisoner was delivered to the '[department].

(b) The dates of any periods after sentence the prisoner was at liberty on bond.

(c) The dates and reasons for any other times the prisoner was at liberty after sentence.

The certificate shall be prima facie evidence of the facts certified.

History.—s. 1, ch. 63-487; ss. 19, 38, ch. 69-106; s. 125, ch. 70-339; s. 1, ch. 70-441; s. 1, ch. 73-71.
'Note.—See s. 20.31, ch. 73-49, for powers, duties, and functions of the Division of Corrections transferred to the department.

921.18 Sentence for indeterminate period for noncapital felony.—The court in its discretion may sentence a defendant convicted of a noncapital felony to the custody of the '[Department of Offender

rights and remedies known at common law obviously affords no basis for the award of attorneys' fees in actions brought under them.

Accordingly, the judgment below is reversed insofar as it awards an attorney's fee to appellee, Fairchild-Florida Construction Co. In every other respect, the judgment is affirmed.

OVERTON, C. J., and ROBERTS, ADKINS, BOYD, ENGLAND and SUNDBERG, JJ., concur.

BROWARD COUNTY, Florida, Appellant,

v.

Constance D. COE et al., Appellees.

No. 49049.

Supreme Court of Florida.

Nov. 30, 1976.

Rehearing Denied Feb. 15, 1977.

Appeal from District Court of Appeal, Fourth District.

Betty Lynn Lee, Gen. Counsel, Edward J. Williams, Asst. Gen. Counsel, and Alexander Cocalis, Deputy Gen. Counsel, Fort Lauderdale, for appellant.

Barry Scott Richard, of Snyder, Young, Stern, Barrett & Tannenbaum, North Miami Beach, for appellees.

ENGLAND, Justice.

The constitutional challenge in this case with respect to Chapter 74-434, Laws of Florida, involves the same point of law as was raised and rejected in prior decisions of this Court. See *Wilson v. Hillsborough County Aviation Auth.*, 138 So.2d 65 (Fla. 1962). As to appellant's other contentions, we adopt the views expressed by Judge Owen in the decision below, reported at 327 So.2d 69 (Fla. 4th DCA 1976).

The decision below is affirmed.

OVERTON, C. J., and SUNDBERG, HATCHETT and DREW (Retired), JJ., concur.

ADKINS and BOYD, JJ., dissent.

David Livingston FUNCHESS, Appellant,

v.

STATE of Florida, Appellee.

No. 47828.

Supreme Court of Florida.

Dec. 9, 1976.

Rehearing Denied Feb. 15, 1977.

Defendant was convicted in the Circuit Court, Duval County, Gordon A. Duncan, Jr., J., of two counts of first-degree murder. Consecutive sentences of death were imposed and defendant appealed. The Supreme Court held that, on considering all the mitigating and aggravating circumstances and carefully reviewing the entire record in the case, the trial court was justified in imposing the death penalty for the commission of atrocious and heinous murders in the course of a robbery.

Affirmed.

England, J., concurred with an opinion.

Homicide ⇐354

Upon Supreme Court's consideration of all mitigating and aggravating circumstances and careful review of entire record in case, trial court was justified in imposing consecutive death sentences for commission of two atrocious and heinous murders in course of robbery.

Louis G. Carres, Asst. Public Defender, for appellant.

Robert L. Shevin, Atty. Gen., and Carolyn M. Snurkowksi, Asst. Atty. Gen., for appellee.

PER CURIAM.

We here review on direct appeal the first degree murder convictions and consecutive sentences of death imposed upon appellant by the Circuit Court in and for Duval County, Florida. Article V, Section 3(b)(1), Constitution of Florida.

Appellant was indicted in a two count indictment for the stabbing death of Anna Waldrop and for the stabbing death of Clayton Ragan. He was convicted on both counts of murder in the first degree, and was sentenced to two consecutive sentences of death after recommendation by the jury that appellant be sentenced to death. Appellant's motion to dismiss the indictment on the ground that the death penalty statute is unconstitutional was denied. Pursuant to Rule 3.210, Florida Criminal Procedure Rules, the trial judge granted appellant's motion suggesting that he was insane and ordered a psychiatric examination. A sanity hearing was held and appellant was adjudged sane.

Three persons, two of whom died, were discovered seriously stabbed at Avondale Liquors in Jacksonville, Florida. At the time of the murders, appellant was in the act of committing robbery.

The trial judge carefully evaluated in detail each of the mitigating and each of the aggravating circumstances set out in Section 921.141, Florida Statutes, and stated, inter alia:

"The robbery and the murders committed by the Defendant were premeditated. The Defendant selected the place for a robbery and like a cobra, he carefully chose the time to strike while casually drinking a cup of coffee across the street from the scene of the crimes. The State has proven beyond a reasonable doubt that the robbery and the murders were premeditated. The objective of the Defendant was to obtain money and he was willing to take the lives of others in order to do so. By stabbing and cutting throats, he killed two people and pitifully mangled a third person who, at this writing, has not recovered consciousness and after seven months, remains in a coma hardly more than a vegetable. The victims were all practically twice the age of the Defendant and two of the victims were women, one of whom was left gasping for breath at the scene of the crimes.

"These are truly some of the most senseless, heinous and horrible murders that have ever taken place in the City of Jacksonville."

We would agree that these were truly senseless, atrocious and heinous crimes.

We have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed and we have also, pursuant to Rule 6.16(b), Florida Appellate Rules, reviewed the evidence to determine whether the interests of justice require a new trial, with the result that we find no reversible error is made to appear and the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded.

Upon considering all the mitigating and aggravating circumstances and careful review of the entire record in the cause, the trial court imposed the death penalty for the commission of the afore-described atrocious and heinous crimes.

Accordingly, the judgment and sentence of the Circuit Court are hereby affirmed.

It is so ordered.

OVERTON, C. J., and ADKINS, BOYD, SUNDBERG, HATCHETT and ROBERTS (Retired), JJ., concur.

ENGLAND, J., concurs with an opinion.

ENGLAND, Justice (concurring).

While I concur with the majority of the Court that David Funchess had a fair trial and was properly sentenced, one of the issues raised in his defense warrants discussion. Funchess asserts that certain photo-

graphs introduced into evidence by the state, which depict the scene of the crimes and the victims, served no legitimate evidentiary purpose, but rather were put before the jury solely to shock them by the horror of the victims' deaths.

We have previously indicated that one who perpetrates a horrible crime is not privileged to have a completely antiseptic trial at which a jury of his peers is immunized from the gruesome details his acts produced. *Henninger v. State*, 251 So.2d 862, 865 (Fla.1971). We have also indicated that photographic evidence which is likely to inflame or shock a jury is inadmissible unless it is relevant to establish at least some aspect of the crime. *Bauldree v. State*, 284 So.2d 196 (Fla.1973); *State v. Wright*, 265 So.2d 361 (Fla.1972); *Henninger*, above; *Young v. State*, 234 So.2d 341 (Fla.1970). Our adoption of a "relevance" test, rather than a "necessary" test, creates troublesome distinctions which obviously will require a case-by-case analysis by trial and appellate judges. My separate discussion of this issue here is written with the hope that prosecutors in Florida will consider in each case the possibility of proving guilt with evidence which includes photographs well under the upper limit of judicial acceptability.

The photographs introduced into this trial were extremely large (16" x 19"), and they were in some cases closeups of the victims and their wounds. I do not have serious doubts as to the propriety of admitting 12 of the 13 photographs introduced, in light of the circumstances of the crime and the testimony which surrounded their introduction. As to state's exhibit 13, however, I seriously question the state's need to introduce the photograph in light of the extremely gruesome expression which was portrayed on the victim's face in death.

This photograph was introduced after the only medical witness had testified as to the causes of death and the state had introduced during his testimony the photographs which he had taken of the victim and wounds. Those photographs were allowed into evidence without objection by the defense. The asserted justification for introducing state's exhibit 13 after his testimony was concluded hinged on a short exchange between defense counsel and the medical examiner to the effect that lacerations on one of the victim's arms were probably produced while she was defending herself against her assailant's attack. Defense counsel timely objected to the introduction of this photograph on the ground that it was so gruesome in its entirety, showing in detail her facial expression in death, and that the arm wounds it depicted were inconsequential in comparison to the total impact it produced. It was also argued that her arm wounds were irrelevant to the cause of death.

State's exhibit 13 does show lacerations to the victim's arm, and the arm is positioned in a way which would suggest an attempt at self-defense. However, the medical testimony was uncontroverted that death occurred from multiple stab wounds to the victim's chest. It seems rather apparent that the state introduced this photograph in an effort to emphasize the gruesome nature of this crime and to portray, more vividly than words could describe, the helpless horror this victim must have felt while attempting to defend herself from brutal assault. I can see no reason why this photograph was necessary in the guilt or innocence phase of this trial, and I am not persuaded by the assertion that defense counsel's cross-examination of the medical examiner developed some discussion concerning an effort at self-defense. In my view, the state went to the limit of what would be permissible without tainting the entire trial.[1]

Given the imprecise nature of our rule regarding relevant but inflammatory photo-

1. I reject any suggestion that errors of this type can be overcome when an appellate court finds ample other evidence in the entire record to demonstrate that a particular defendant has committed the crimes with which he or she was charged. That formula is too simple. If that were the rule of law, there would be no reason to limit the bounds of permissible evidence.

graphic evidence, and the fact we have recently upheld several convictions in which photograph evidence was to my mind as gruesome and unnecessary as this photograph, I find no basis to reverse the conviction in this case. I echo an earlier suggestion from this Court, however, that prosecutors in this state should be more circumspect in their endeavors and should remove from the courtrooms of this state, to the fullest extent possible, the elements of passion and emotion.[2] We must all strive for a system in which juries convict alleged criminals solely on the basis of proof, without resort to the horror of particular crimes. Our Code of Professional Responsibility requires no less:

"The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."[3]

James ADAMS, Appellant,

v.

STATE of Florida, Appellee.

No. 45450.

Supreme Court of Florida.

Dec. 16, 1976.

Rehearing Denied Feb. 14, 1977.

Defendant was convicted in the Circuit Court, St. Lucie County, Wallace Sample, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court held that liability for second-degree felony-murder occurs only when the individual perpetrates the underlying felony as an accessory before the fact but does not personally engage in it; that the trial court did not err because its instructions on second-degree murder did not track the statute; and that, under the circumstances, the sentence of death was appropriate.

Affirmed.

Boyd, J., dissented and filed an opinion.

Hatchett, J., dissented.

1. Homicide ⇐18(1)

Under felony-murder rule, state of mind is immaterial and even accidental killing during felony is murder; malice aforethought is supplied by felony, and in this manner rule is regarded as constructive malice device. West's F.S.A. §§ 782.04, 782.04(1), (1)(a), (3).

2. Homicide ⇐18(1)

Language in second-degree felony-murder provision, "except as provided in subsection (1)," which refers to first-degree felony-murder provision, limits liability for second-degree felony-murder to occurrences when individual perpetrates underlying felony as accessory before fact but does not personally engage in it. West's F.S.A. § 782.04(1, 3).

3. Homicide ⇐18(1)

Under 1972 felony-murder statute, individual who personally kills another during perpetration or attempt to perpetrate one of enumerated felonies is guilty of first-degree murder, and in such circumstances statutory scheme does not allow for conviction of second-degree murder. West's F.S.A. § 782.04(1, 3).

4. Homicide ⇐30(1)

Liability for first-degree felony murder extends to all of perpetrator's cofelons who are personally present since, as perpetrators of underlying felony, they are principals in homicide; felony-murder rule and law of principals combines to make felon generally responsible for lethal acts of his cofelons. West's F.S.A. § 782.04.

2. *Young v. State*, 234 So.2d 341, 348 (Fla.1970).

3. Fla.Bar Code Prof.Resp., E.C. 7-13.

David Livingston FUNCHESS, Appellant,

v.

STATE of Florida, Appellee.

No. 47828.

Supreme Court of Florida.

Feb. 8, 1979.

Defendant was convicted in the Circuit Court, Duval County, Gordon A. Duncan, Jr., J., of first-degree murder, sentenced to death, and he appealed. The Supreme Court, 341 So.2d 762, affirmed. Pursuant to the dictates of the United States Supreme Court's *Gardner* decision, the Florida Supreme Court ordered the trial judge who imposed the death sentence to advise the Court whether he imposed the sentence after consideration of any information not known to appellant. The Supreme Court then held that where the trial judge, at the time he imposed sentence, had before him a confidential portion of the presentence investigation report, and where defendant, by affidavit, asserted that he was not shown that report, the sentence of death would be vacated and the case remanded for resentencing.

Remanded for resentencing.

Criminal Law ⇐1188

Where the trial judge, at the time he imposed death sentence, had before him a confidential portion of the presentence investigation report, and where defendant, by affidavit, asserted that he was not shown that report and requested relief pursuant to the United States Supreme Court's *Gardner* decision, the sentence would be vacated and the case remanded for resentencing. West's F.S.A. § 921.141.

Louis G. Carres, Asst. Public Defender, Tallahassee, for appellant.

Carolyn M. Snurkowski and Charles W. Musgrove, Asst. Attys. Gen., Tallahassee, for appellee.

ORDER

Pursuant to the dictates of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), this Court ordered the trial judge who imposed the death sentence to advise the Court whether he imposed the death sentence after consideration of any information not known to appellant. His initial response stated that no information undisclosed to appellant was considered. Upon order for clarification, however, the trial judge advised the Court that he had before him a confidential portion of the presentence investigation report on appellant. Appellant asserts, by affidavit, that he was not shown that report and requests relief pursuant to *Gardner*.

On consideration of appellant's petition and the trial court's responses to our *Gardner* order and our order for clarification, and pursuant to the decision of the United States Supreme Court in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), appellant's sentence of death in this cause is vacated. The case is remanded to the trial court for resentencing, without the necessity of an advisory jury, but with directions to provide counsel for the state and the defendant an opportunity to explain, contradict, and argue regarding the relevance, materiality, and import of the confidential information, as well as other matters properly considered by the trial court concerning appellant's sentence under section 921.141, Florida Statutes (1977).

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., concur.

David Livingston FUNCHESS, Appellant,

v.

STATE of Florida, Appellee.

No. 47828.

Supreme Court of Florida.

April 2, 1981.

Rehearing Denied June 30, 1981.

After death sentences imposed on defendant, who was convicted on two counts of first-degree murder, were affirmed, 341 So.2d 762, and subsequently vacated, 367 So.2d 1007, the death sentences, on remand, were again ordered by the Circuit Court, Duval County, Gordon A. Duncan, Jr., J., and defendant appealed. The Supreme Court held that: (1) on remand, reconvening of an advisory jury was not required, and (2) there was substantial competent evidence to support express findings of trial judge that death sentences were appropriate for defendant.

Affirmed.

McDonald, J., dissented.

1. Criminal Law ⇐1192

Trial court, on remand for resentencing of defendant after his death sentences had been vacated in light of United States Supreme Court decision, was not required to reconvene an advisory jury.

2. Criminal Law ⇐1208(1)

On remand for resentencing after defendant's death sentences had been vacated, substantial competent evidence supported express findings of trial judge that defendant's death sentences were appropriate, and trial judge properly performed his weighing function with respect to mitigating and aggravating circumstances.

Louis G. Carres, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Carolyn M. Snurkowski and Charles W. Musgrove, Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

David Livingston Funchess was tried and convicted of two counts of murder in the first degree and was sentenced to death in trial court proceedings affirmed by this Court.[1] Following a subsequent United States Supreme Court decision in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), we vacated Funchess' death sentences and remanded his case to the trial court for resentencing without an advisory jury proceeding.[2]

On remand, an evidentiary hearing was conducted by the trial court at which Funchess presented evidence in mitigation of his sentences. Nonetheless, the trial court in due course entered an order again sentencing Funchess to death, following which Funchess brought this case to us for review.

[1] Funchess makes a number of legal attacks on the propriety of instructions given to the jury at the sentencing proceeding of his first trial, arguing that the order remanding for so-called "*Gardner* relief" should have included a mandate for reconvening an advisory jury. We reject all of these contentions. The purpose for our remand was to comply with the dictates of the United States Supreme Court in *Gardner v. Florida*; it was not to provide an entirely new sentencing proceeding at which a new advisory jury could be reconvened. *Songer v. State*, 365 So.2d 696 (Fla. 1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Complying with our mandate, the trial court properly rejected all legal points raised by Funchess' counsel.

[2] The only proper question now presented is whether there is substantial competent evidence to support the express findings of the trial judge that sentences of

1. *Funchess v. State*, 341 So.2d 762 (Fla.1976), *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977).

2. *Funchess v. State*, 367 So.2d 1007 (Fla.1979).

death are appropriate for Funchess. We are satisfied from our review of the evidence presented at the resentencing procedure, and from the record of the original sentencing proceeding: first, that the trial judge properly performed his weighing function with respect to the one new mitigating circumstance developed at the resentencing proceeding and the aggravating factors which had been established at the original proceeding (all but one of which were unchallenged on remand); and second, that there was substantial and competent evidence to support the findings of the trial judge with respect to the aggravating and mitigating circumstances articulated in his resentencing order.

The dictates of *Gardner v. Florida* have been faithfully met by the trial court in this case, and sentences of death were properly imposed. We affirm the trial court's new death sentences.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

McDONALD, J., dissents.

THE FLORIDA BAR, Petitioner,

v.

G. B. T., Respondent.

No. 59334.

Supreme Court of Florida.

April 23, 1981.

Rehearing Denied June 30, 1981.

In disciplinary proceeding, the Supreme Court, England, J., held that failure for six months to deliver to client status report and refusal to respond to client's inquiries regarding an unemployment claim, for which statute of limitations had elapsed prior to date of retention of services, constitute neglect of legal matter and warrant reprimand.

Order accordingly.

1. Attorney and Client ⇐48

Nowhere in Florida Integration Rule is bar counsel empowered to charge an ethical violation without a finding of probable cause by either grievance committee or Board of Governors of the Florida Bar; on the contrary, the Integration Rule provides mechanisms by which bar counsel can proceed if he deems the finding of grievance committee technically deficient, or if he chooses to recommend to Board of Governors that it make a finding of probable cause against the attorney. 32 West's F.S.A. Rules of the Florida Bar, Art. 11, Rules 11.01 et seq., 11.04(6)(b), 11.05(2).

2. Attorney and Client ⇐44(1), 58

Failure for six months to deliver to client a status report and refusal to respond to client's inquiries regarding an unemployment claim, for which statute of limitations had elapsed prior to date of retention of services, constitute neglect of matter and warrant reprimand. 32 West's F.S.A. Code of Professional Responsibility, DR6-101(A)(3).

Wallace N. Maer, Bar Counsel, Miami, for petitioner.

Hugh F. Quinn, Coral Gables, and Louis M. Jepeway of Jepeway & Jepeway, Miami, for respondent.

ENGLAND, Justice.

The Florida Bar brought a disciplinary action against G.B.T., resulting in a referee's report recommending a six-month suspension from the practice of law, payment of the proceedings' costs, and his making restitution to his client. Both The Florida Bar and G.B.T. have asked us to review the report of the referee.

IN THE SUPREME COURT OF FLORIDA

DAVID LIVINGSTON FUNCHESS,	:	
Appellant,	:	
vs.	:	Case No. 47,828
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

MOTION FOR REHEARING

COMES NOW the appellant, DAVID LIVINGSTON FUNCHESS, pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure and moves this Court for rehearing in the above-styled cause. As grounds for same, the appellant would show as follows:

1. In the opinion rendered by the Court on April 2, 1981, appellant's sentences of death were upheld after a remand to the trial court for resentencing.

In deciding that the trial judge properly performed his weighing function and that there was substantial and competent evidence to support his findings it would appear that this Court may have overlooked the possible existence of a statutory mitigating circumstance that was not considered by the trial judge.

2. Even though appellant has never served a term of imprisonment nor been convicted of a felony, the trial judge found that the mitigating factor of no significant history of prior criminal activity did not apply. It was noted that appellant had prior arrests, prior misdemeanor convictions, and had admitted to previously taking money from his murder victims and using drugs. In light of appellant's history which was presented to the trial court and formed the basis for the trial judge's finding that the capital crimes were committed by appellant while he was under the influence of extreme mental and emotional

disturbance, it should have been clear that the crimes admitted by appellant concerning the theft of money from his victims and his use of drugs were all part of his ongoing mental problems.

3. In light of the fact that the only major things noted in the trial judge's finding of significant prior criminal activity involved the problems which contributed to appellant's mental state and subsequent capital offenses, it is ludicrous to find these a negating factor for the mitigating circumstance when they did not result in any convictions and indeed may all be part of the incident which culminated in the capital offenses.

4. Appellant asserts that the mitigating circumstance of no significant prior criminal activity should always be applied to people such as appellant who have not shown a history of criminal incidents that indicate a career criminal who is not amenable to correction by society. In appellant's case he was never imprisoned nor convicted for more than minor incidents and such, coupled with the factors which led to the instant capital offenses could never be considered significant.

5. Appellant would assert that the trial judge had no objective guidelines on which to base his findings concerning this mitigating factor since none have ever been established in previous case law that could assure uniformity throughout the range of capital cases. Without such it cannot be said that the criteria for imposition of capital punishment is applied uniformly throughout the courts of this state in every capital case.

WHEREFORE, appellant prays that this Honorable Court will grant his motion for rehearing and thereafter alter its opinion and decision, remanding this case to the trial court with directions that appellant's sentence be reconsidered with the finding of an additional mitigating circumstance of no significant history of prior criminal activity.

Respectfully submitted,

THEODORE E. MACK
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Rehearing has been furnished by hand-delivery to the Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida; on this 15th day of April, 1981.

THEODORE E. MACK

RECEIVED
JUL 6 1981
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

IN THE SUPREME COURT OF FLORIDA

TUESDAY, JUNE 30, 1981

DAVID LIVINGSTON FUNCHESS,	**	
Appellant,	**	CASE NO. 47,828
vs.	**	Circuit Court Case No. 75-169 CF Div. R
STATE OF FLORIDA,	**	(Duval)
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., Concur
McDONALD, J., Dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

cc: Hon. S. Morgan Slaughter, Clerk
Hon. Gordon A. Duncan

Theodore E. Mack, Esquire
Carolyn Snurkowski, Esquire

THIS INSTRUMENT IS IN COMPUTER

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 75-169 CF DIVISION "R"

STATE OF FLORIDA

-vs-

DAVID LIVINGSTON FUNCHESS

SENTENCE

FILED

JUL 18 1975

CLERK - CIRCUIT COURT

SUMMARY

An indictment containing two separate counts of Murder in the First Degree was returned by a Grand Jury in Duval County, Florida, on the 7th day of January, 1975, against the Defendant, David Livingston Funchess, wherein the Grand Jurors found and charged that David Livingston Funchess did, on the 16th day of December, 1974, in the County of Duval, State of Florida, unlawfully and from a premeditated design to effect the death of Anna Waldrop, kill the said Anna Waldrop by stabbing her to death, contrary to the provisions of Section 782.04, Florida Statutes; and for a second count in said indictment, the Grand Jurors aforesaid found and charged that the said David Livingston Funchess did, on the 16th day of December, 1974, in the County of Duval, State of Florida, unlawfully and from a pre-

meditated design to effect the death of Clayton Keaton Ragan, kill the said Clayton Keaton Ragan by stabbing him to death, contrary to the provisions of Section 782.04, Florida Statutes.

Subsequently thereto, a Motion to Dismiss said indictment was filed herein on February 18, 1975 and said Motion to Dismiss the indictment was denied by the Court on February 28, 1975.

On April 18, 1975, the Defendant's attorney filed a Motion, pursuant to Rule 3.210, Florida Rules of Criminal Procedure, suggesting that the Defendant was insane and that he be examined. The Court thereupon granted said Motion and ordered an examination and the Defendant was psychiatrically examined. Subsequently thereto, a sanity hearing was held on May 2, 1975, and the Defendant, David Livingston Funchess, was adjudged sane by the Court on said date.

The Defendant's trial on the charges contained in the indictment was begun on May 13, 1975 and completed on May 15, 1975, at which time the Trial Jury returned a verdict finding the Defendant guilty on both counts in the indictment of Murder in the First Degree.

On May 16, 1975, a sentencing proceeding was held pursuant to Section 921.141, Florida Statutes, and on said date, a majority of the jury, to-wit: ten (10) of the twelve (12) members thereof, rendered an advisory sentence to the Court finding:

1. That sufficient aggravating circumstances existed to justify a sentence of death; and

2. That sufficient mitigating circumstances did not exist which outweighed any aggravating circumstance so as to justify a sentence of life imprisonment rather than a sentence of death; and

3. That based upon those considerations, the Defendant should be sentenced to death.

The Defendant, David Livingston Funchess, is now before the Court for sentencing.

The Defendant testified at the trial in this cause and admitted therein that he was physically at the scene of the crimes on the date said crimes occurred but he denied that he was guilty of either of said crimes of which the jury found him guilty, to-wit: two separate counts of Murder in the First Degree.

At the sentencing proceeding, evidence was presented relating to the aggravating and mitigating circumstances enumerated in subsections 5 and 6 of Section 921.141, Florida Statutes. All evidence received at said sentencing proceeding was deemed by the Court to have probative value and the Defendant was afforded a fair opportunity to rebut all hearsay statements. The State and the Defendant were each permitted to present arguments for or against a sentence of death and for or against a sentence of life.

FINDINGS OF FACT

Upon my review of the evidence presented at the trial and the sentencing proceeding, together with my review of my notes taken at both the trial and sentencing proceeding, together with a presentence investigation report made by and received from the Florida Parole and Probation Commission, I do make the following specific written findings of fact, based upon the circumstances cited in subsections 5 and 6 of Section 921.141, Florida Statutes, to-wit:

MITIGATING CIRCUMSTANCES

(a) The Defendant, David Livingston Funchess, has a significant history of prior

criminal activity, as follows:

1. On June 27, 1970, the Defendant was charged with Grand Larceny. He was allowed to plead guilty to Petit Larceny and was sentenced to a term of six (6) months in the County Jail.

2. On September 19, 1973, the Defendant was charged with a Breach of the Peace and was fined $50.00. The sentence was suspended.

3. On February 14, 1974, the Defendant was fined $50.00 for Loitering.

4. On March 14, 1974, the Defendant was charged with Breaking and Entering and the case was dismissed on March 22, 1974.

5. On April 29, 1974, the Defendant was arrested for Public Intoxication and Obstructing Traffic. He was fined $26.00 on both charges; and

6. On August 20, 1974, the Defendant was arrested on a charge of Trespass after Warning. The charge was dismissed.

The Court therefore finds that this circumstance of the case is not a mitigating circumstance.

(b) The capital felonies committed by the Defendant were not committed while the Defendant was under the influence of extreme mental or emotional disturbance. The Defendant was adjudicated sane at a sanity hearing prior to trial; and there was no evidence produced at the trial or at the sentencing proceeding that would show the Defendant to be mentally unbalanced or emotionally disturbed. The Court therefore finds that this circumstance of the case is not a mitigating circumstance.

(c) The victims in this case were not participants in the Defendant's conduct nor did any of them consent to his acts. The Court therefore finds that this circumstance of the case is not a mitigating circumstance;

(d) The Defendant was not an accomplice in the commission of the capital felonies and the capital felonies were not committed by any person other than the Defendant. The Court therefore finds that this circumstance of the case is not a mitigating circumstance.

(e) The Defendant did not act under extreme duress nor did he act under the substantial domination of any other person. He acted completely on his own and his acts were of his own free will. These murders were his decision alone. The Court therefore finds

that this circumstance of the case is not a mitigating circumstance.

(f) The examination and evaluation by Dr. Ernest C. Miller of University Hospital, Jacksonville, Florida, revealed that in the opinion of the doctor, the Defendant was able to understand the nature, quality and wrongfulness of his acts. The capacity of the Defendant to conform his conduct to the requirements of law was not substantially impaired. The Court does not recall any evidence that would show otherwise. The Defendant had no physical or mental impairment that would prevent him from obeying the law. The Court therefore finds that this circumstance of the case is not a mitigating circumstance.

(g) The Defendant was twenty-seven (27) years of age at the time he committed these murders. He was a high school graduate and had served in the armed forces. He was sophisticated. The Court therefore finds that this circumstance of the case is not a mitigating circumstance.

AGGRAVATING CIRCUMSTANCES

(a) The Defendant was not under any sentence of imprisonment when he committed the

capital felonies of Murder in the First Degree. The Court therefore finds that this circumstance of the case is not an aggravating circumstance.

(b) The Defendant has not been previously convicted of another capital felony or a felony involving the use or threat of violence to a person. The Court therefore finds that this circumstance of the case is not an aggravating circumstance.

(c) The Defendant did not knowingly create a great risk of death to many persons. The Court therefore finds that this circumstance of the case is not an aggravating circumstance.

(d) The capital felonies were committed while the Defendant was engaged in the commission of the life felony of Robbery. The Court therefore finds that this circumstance of the case is an aggravating circumstance.

(e) The capital felonies were committed for the purpose of avoiding or preventing a lawful arrest. The Defendant, David Livingston Funchess, is a former employee of Avondale Liquors where the victims were murdered and he knew that he would be recognized by them. He was not wearing a mask nor was he disguised in any manner. The Defendant acted accordingly; in an effort to avoid or prevent a lawful arrest for the crime of robbery, he committed the crimes of premeditated

murder. The Court therefore finds that this circumstance of the case is an aggravating circumstance.

(f) The capital felonies of Murder in the First Degree were committed by the Defendant for pecuniary gain. The Defendant was engaged in the act of committing the life felony of Robbery for the purpose of personal pecuniary gain. As a former employee of Avondale Liquors, he well knew that the receipts for the weekend's business were there for the taking and he was willing to and did commit several murders in order to get that money without being identified. The Court therefore finds that this circumstance of the case is an aggravating circumstance.

(g) The capital felonies were not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. The Court therefore finds that this circumstance of the case is not an aggravating circumstance.

(h) The capital felonies committed by this Defendant were heinous, atrocious and cruel.

The robbery and the murders committed by the Defendant were premeditated. The

Defendant selected the place for a robbery and like a cobra, he carefully chose the time to strike while casually drinking a cup of coffee across the street from the scene of the crimes. The State has proven beyond a reasonable doubt that the robbery and the murders were premeditated. The objective of the Defendant was to obtain money and he was willing to take the lives of others in order to do so. By stabbing and cutting throats, he killed two people and pitifully mangled a third person who, at this writing, has not recovered consciousness and after seven months, remains in a coma hardly more than a vegetable. The victims were all practically twice the age of the Defendant and two of the victims were women, one of whom was left gasping for breath at the scene of the crimes.

These are truly some of the most senseless, heinous and horrible murders that have ever taken place in the City of Jacksonville.

The Court therefore finds that this circumstance of the case is an aggravating circumstance.

It is the feeling of this Court that if our society is to survive and continue to exist as a society of people dependent upon each other for that existence, we must do whatever is necessary to stop the rapidly increasing

crime rate and it goes without saying that the primary responsibility in this regard rests upon the shoulders of the Criminal Justice System.

The merchants of Jacksonville have a right to and should be able to operate their businesses without constantly being apprehensive or fearful of assault; robbery or murder.

The Court has received and has been guided by the advisory sentence of the sentencing jury rendered in this cause. After weighing the aggravating and mitigating circumstances of this case, the Court finds and determines that:

(a) sufficient aggravating circumstances exist as enumerated in subsection 5 of Section 921.141, Florida Statutes, and that/

(b) there are insufficient mitigating circumstances as enumerated in subsection 6 of Section 921.141, Florida Statutes, to outweigh the aggravating circumstances.

It is, therefore, the reasoned judgment of the Court and finding by this Court that the circumstances and the facts of this case justify and require two (2) separate sentences of death for the Defendant.

The Court hereby adjudges the Defendant, David Livingston Funchess, to be guilty of Murder in the First Degree on each of the separate counts found in the indictment herein.

The Court hereby sentences the Defendant, David Livingston Funchess to death on the first count of the indictment herein; and

The Court also hereby sentences the Defendant, David Livingston Funchess to a separate, additional sentence of death on the second count of the indictment herein. It is hereby further ordered that this additional sentence of death on the second count of the indictment shall run and be consecutive to the aforesaid death sentence imposed on the first count of the indictment herein.

It is the further Order of this Court that the Defendant, David Livingston Funchess, be taken by the proper authorities to the Florida State Prison, to be securely confined until his execution, on a date to be subsequently determined.

The Court now advises the Defendant, David Livingston Funchess, that it is your right to appeal from this judgment and sentence within thirty (30) days from this date. You are further advised that you are entitled to assistance of counsel in taking an appeal. Upon your request, and showing that you are entitled to an attorney at the expense of the State, the Court will

appoint one for you.

DONE AND ORDERED AND SENTENCED in Open Court, at the Duval County Courthouse, Jacksonville, Florida, on the 18th day of July, A. D., 1975.

Gordon A. Duncan Jr.

CIRCUIT JUDGE

FILED
DEC 6 1979
E. Margaret Slaughter
CLERK, CIRCUIT COURT

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO. 75-169-CF DIVISION "R"

STATE OF FLORIDA)
)
-vs-)
)
DAVID LIVINGSTON FUNCHESS)

S E N T E N C E

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SUMMARY

The Defendant, David Livingston Funchess, was indicted on two separate counts of murder in the first degree, was tried by jury on both counts and found guilty on both counts. A motion for new trial was denied.

In a separate sentencing proceeding, the sentencing jury rendered an advisory sentence of death and the court sentenced the Defendant to a sentence of death on each of the two separate counts found in the indictment.

Upon review, the Supreme Court of Florida agreed with this court that the murders committed by the Defendant were senseless, atrocious and heinous and upon finding no reversable error, affirmed the judgment and sentence of this court.

On October 3, 1977, the Supreme Court of the United States denied Defendant's Petition for a Writ of Certiorari.

Several years later, pursuant to the dictates of the United States Supreme Court in the case of Gardner vs. Florida, 430 U.S. 349 (1977), the Supreme Court of Florida vacated the death sentences imposed by this court and remanded this case for resentencing, without the necessity of an advisory jury, but with directions to provide counsel for the state and the Defendant an opportunity to explain, contradict and argue, concerning the relevance, materiality and import of the confidential information contained in the presentence investigation report as well as other

matters properly considered by the trial court concerning Defendant's sentence under Section 921.141, Florida Statutes (1977).

In full compliance with the Order of the Supreme Court of Florida, this court has conducted resentencing proceedings, has considered and ruled upon numerous motions by the Defendant, and has afforded the Defendant the benefit of all court procedures and substantive rights available to an unsentenced Defendant.

At the request of the Defendant and over the objection of the State, the court permitted a series of four psychiatric interviews of the Defendant, using an Amytal induction Technique (a type of narcosynthesis). The examining psychiatrist, Dr. Ernest G. Miller, M. D., testified at one of the sentencing hearings and his report to the court, with copies to the Defendant and the State, was filed in evidence.

The State and the Defendant were each furnished a copy of the presentence investigation report, including the confidential portion thereof, as well as with a copy of the psychiatrist's report, dated April 24, 1975, both of which reports were considered by the court prior to its previous sentence. The court has provided a full and complete sentencing hearing, entertaining all submissions and evidence of the State and the Defendant relevant to sentence, as requested by Defendant. The court has also reviewed the testimony adduced at trial. The findings and judgment of this court are not based upon any information not known to the Defendant or the State.

The Defendant, David Livingston Funchess, now stands before this court unsentenced.

FINDINGS IN SUPPORT OF SENTENCE

Pursuant to the requirements of law, the court now makes and sets forth in writing the following findings of fact in support of sentence.

MITIGATING CIRCUMSTANCES

(a) The Defendant, David Livingston Funchess, has a significant history of prior criminal activity. The record reflects as follows:

(1) On June 27, 1970, the Defendant was charged with Grand Larceny, plead guilty to Petit Larceny and was sentenced to six months in jail.

(2) On September 19, 1973, Defendant was charged with a Breach of the Peace and fined $50.00, with sentence suspended.

(3) On February 14, 1974, the Defendant was fined $50.00 for Loitering.

(4) On March 14, 1974, the Defendant was charged with Breaking and Entering. The charge was dismissed on March 22, 1974.

(5) On April 29, 1974, Defendant was arrested for Public Intoxication and Obstructing Traffic and was fined $26.00 on both charges.

(6) On August 20, 1974, Defendant was arrested on a charge of Trespass After Warning. The charge was dismissed.

(7) On July 3, 1979, Defendant admitted to this court that he stole money from Avondale Lounge in the approximate amount of eight hundred dollars; that he was fired because of the theft and that his employer was justified in firing him for that reason.

(8) On July 3, 1979, Defendant told this court that he went to the Avondale Lounge in December, 1974, to rob it.

(9) On July 3, 1979, Defendant admitted using heroin and marijuana.

The court finds that this circumstance of the case is not a mitigating circumstance.

(b) The capital felonies committed by the Defendant were committed while the Defendant was under the influence of extreme mental and emotional disturbance.

This finding of the court is based upon the expert medical testimony adduced at the sentencing hearing.

The court, therefore, finds that this circumstance of the case is a mitigating factor.

(c) Neither of the murdered victims in this case participated in any way in the Defendant's conduct nor did either of them consent to his acts.

The court, therefore, finds that this circumstance of the case is not a mitigating circumstance.

(d) The Defendant was not an accomplice in either of these capital felonies committed by another person and his participation was not relatively minor.

The Defendant was charged with the sole commission of each of these murders and was found guilty by the trial jury of each of these murders. The Defendant shares his guilt with no one. He gave assistance to no one. He was the sole perpetrator of these crimes.

The court, therefore, finds that this circumstance of the case is not a mitigating circumstance.

(e) The Defendant did not act under extreme duress nor did he act under the substantial domination of another person.

The Defendant was not threatened with bodily harm or any other type harm by anyone or anything. No one did anything against the Defendant that would amount to coercion of, or that would even tend to coerce the will of, the Defendant, thereby

inducing Defendant to commit any acts contrary to his own free will. Defendant committed each of these murders of his own free will.

The court, therefore, finds that this circumstance of the case is not a mitigating circumstance.

(f) The Defendant had the capacity to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of law was not substantially impaired.

Although the psychiatrist speculated at the sentencing hearing that, in his opinion, the Defendant was high on heroin at the time he committed these murders. It was also the psychiatrist's opinion that there was a certain thread of logical progression in these criminal acts, that is to say, that the Defendant planned and put it all together then took certain evasive steps all of which meant to the psychiatrist that all of the Defendant's cognition certainly was not suspended by the effect of heroin if, indeed, heroin was involved. The psychiatrist further testified that in his opinion, the Defendant had the ability to conform his acts to the requirements of law whether he was using heroin or not and that "overall", Defendant's ability in this regard was not substantially impaired.

The court, therefore, finds that this circumstance of the case is not a mitigating circumstance.

(g) The age of the Defendant at the time of these crimes was twenty-seven years.

The record reflects that the Defendant had graduated from high school and thereafter served a period of years with the armed forces before committing the two murders for which he was found guilty as charged. He was old enough to abide by adult standards of conduct.

The court, therefore, finds that this circumstance of the case is not a mitigating circumstance.

AGGRAVATING CIRCUMSTANCES

(a) The record does not reflect that the Defendant was under sentence of imprisonment at the time he committed the capital felony murders.

The court, therefore, finds that this circumstance of the case is not an aggravating circumstance.

(b) The record reflects that the Defendant has not been previously convicted of another capital felony or a felony involving the use or threat of violence to a person.

The court, therefore, finds that this circumstance of the case is not an aggravating circumstance.

(c) In committing these murders, the Defendant did not knowingly create a great risk of death to many.

The court, therefore, finds that this circumstance of the case is not an aggravating circumstance.

(d) The capital felonies of murder were committed by the Defendant while he was engaged in the commission of robbery.

At his sentencing hearing, the Defendant admitted to the court that he had gone to the Avondale Lounge on December 16, 1974, to rob the place and, further, that he did rob the place on that day.

The court, therefore, finds that this circumstance of the case is an aggravating circumstance.

(e) These murders were committed by the Defendant for the purpose of avoiding or preventing lawful arrest.

The Defendant is a former employee of the liquor store where the murders were committed and the people working there knew him because they were working there when he worked there. The Defendant wore no mask and he knew that he would be recognized. He was willing to and did commit murder to prevent recognition.

The court, therefore, finds that this circumstance of the case is an aggravating circumstance.

(f) Although the capital felonies of murder were committed by the Defendant for pecuniary gain, the court finds that this circumstance of the case should be merged with the circumstance contained in subparagraph (d) above, inasmuch as in all robbery - murders, both subsections refer to the same aspect of a Defendant's crime.

The court, therefore, finds that this circumstance of the case is not an aggravating circumstance.

(g) The capital felonies of murder committed by the Defendant were not committed by him in order to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

The court, therefore, finds that this circumstance of the case is not an aggravating circumstance.

(h) The capital felonies of murder committed by the Defendant were "heinous", "atrocious" and "cruel".

The Supreme Court of Florida has said that as used in the statute relating to "Aggravating Circumstances", the word, "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; and that "cruel" means designed to inflict a high degree of pain, with either indifference to or even enjoyment of, the suffering of others. The Defendant's murders in this case were each, in some degree, all of the aforesaid.

The Defendant's victim, Mr. Ragan, died as a result of multiple stab wounds in his chest and massive internal bleeding. His throat was slashed, leaving a gaping four inch long hole in his neck. One stab wound cut through the pulmonary artery leading from the heart - he was stabbed from the front and from the back - both lungs being punctured - a total of six different stabs. His upper left arm even had four separate contusions.

The Defendant's victim, Anna W. Waldrop, a middle aged woman who weighed a mere one-hundred-and-fifteen pounds, also died

as the result of multiple stab wounds and massive internal bleeding. Her throat was slashed in two places and she was stabbed in the chest four different times, one stab wound included a puncture of her right lung and another perforated a large artery leading from her heart. There were also several cuts on her right arm, possibly indicating that she tried to defend herself from the Defendant's vicious attack.

The court, therefore, finds that this circumstance of the case is an aggravating circumstance.

Since the Defendant's murders in 1974 and his death sentences in 1975, the legislature of the State of Florida has amended Chapter 921 of the Florida Statutes, adding an additional aggravating circumstance, to-wit: subsection (e) of subsection (5) of Section 921.141, Aggravating Circumstances, which reads as follows:

> "(e) The capital felony (homicide) was committed in a cold, calculated and premediated manner without any pretense of moral or legal justification".

However, inasmuch as the Defendant's murders were committed in 1974, the court is of the opinion that Section 921.141 (5)(e), Florida Statutes (1979), is not applicable to this case and should not be considered by the court in this case. Since the court is not considering same in this case, the court finds that this circumstance is not a circumstance of this case.

Upon consideration of the evidence presented at Defendant's trial, the advisory sentence of the "sentencing jury" and the evidence presented at the sentencing hearings, and after weighing the foregoing aggravating and mitigating circumstances. this court finds that sufficient aggravating circumstances exist as enumerated in subsection (5) of Section 921.141, Florida Statutes, and this court further finds that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

It is, therefore, the reasoned judgment of and the finding by this court that the circumstances and facts of this case justify sentences of death for the Defendant.

The court, therefore, hereby finds and adjudicates the Defendant, David Livingston Funchess, to be guilty of murder in the first degree on each of the two counts found in the indictment herein.

By pronouncement, this court hereby sentences the Defendant, David Livingston Funchess, to a sentence of death on the first count of murder in the first degree of the indictment herein and this court further hereby sentences the Defendant, David Livingston Funchess, to a separate and additional sentence of death on the second count of murder in the first degree of the indictment herein, and it is further hereby ordered and adjudged that this said additional sentence of death on the second count of murder in the first degree of the indictment herein shall run and be consecutive to the aforesaid sentence of death hereby imposed on the first count of murder in the first degree of the indictment herein.

The Sheriff of Jacksonville, Duval County, Florida, is hereby ordered and directed to immediately transport the Defendant, David Livingston Funchess, to the Florida State Prison, Starke, Florida, where he shall be securely confined until his execution by electrocution on a date to be subsequently determined.

ORDERED, ADJUDGED and SENTENCED at Jacksonville, Duval County, Florida, this 6th day of December 1979.

Hayden O. Duncan J.
CIRCUIT JUDGE

erroneous copy that I had, my own copy was in error and I ask you not to treat my error against Mr. Funchess.

MR GREENE: Your Honor, I'd like the record to show that I appreciate the acknowledgment and that it was not at the request of the State, nor did I request that he correct it and the delay hasn't been brought on by the State.

THE COURT: Thank you, gentlemen. Are there any further arguments or questions concerning this case at this time?

MR. GREENE: No, Your Honor.

MR. ROHAN: No, Your Honor.

MR. AUSTIN: The State has nothing further, Your Honor.

THE COURT: All right. Thank you.

INSTRUCTIONS TO THE JURY

BY THE COURT:

Ladies and gentlemen of the jury, please give me your undivided attention. You have heard the evidence and arguments of counsel necessary to enable you to render an advisory sentence to the Court as to whether the defendant should be sentenced to death or life imprisonment. Your advisory sentence will have three parts: Number One, whether sufficient aggravating circumstances exist to justify a sentence of death when one or more of

the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances.

Number Two: Whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death.

And Number Three: Based on those considerations, whether the defendant should be sentenced to life imprisonment or to death.

Number Four: The aggravating and mitigating circumstances must be proved beyond a reasonable doubt.

Your advisory sentence may be made by a majority of the jury, it does not have to be unanimous. The Court is not required to follow your recommendation.

In considering whether sufficient aggravating circumstances exist to justify a sentence of death, you shall consider only the following: (A) Whether the defendant was under sentence of imprisonment when the defendant committed the murders of which the defendant has been convicted; (B) whether the defendant has previously been convicted of another capital felony or of a felony involving the use of threat of violence to the person; (C) whether in committing the murders in

which the defendant had been convicted, the defendant knowingly created a great risk of death to many persons; (D) whether the murders of which the defendant had been convicted of was committed while the defendant was engaged in the commission of or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb; (E) whether the murders of which the defendant had been convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (F) whether the murders of which the defendant had been convicted was committed for pecuniary gain; (G) whether the murders of which the defendant had been convicted was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and (H) whether the murders of which the defendant had been convicted was especially heinous, atrocious or cruel.

In considering whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death, you shall consider the following:

(A) Whether the defendant has no significant history

of prior criminal activity; (B) whether the murders were committed while the defendant was under the influence of extreme mental or emotional disturbance; (C) whether the victims were participants in the defendant's conduct or consented to the act; (D) whether the defendant acted under extreme duress or substantial domination of another person; (E) whether the defendant was an accomplice in the murders committed by another person and the defendant's participation was relatively minor; (F) whether the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired; and (G) the age of the defendant at the time of the crime.

Gentlemen, are there any other advisory recommendations?

MR. GREENE: The State has none, Your Honor.

MR. ROHAN: None, Your Honor.

THE COURT: Or instructions, rather.

All right. Ladies and gentlemen of the jury, at this time I am going to give you a copy of these instructions and ask you to retire to the jury room to consider your advisory sentence and also I have here an advisory sentence which has been prepared with the joint agreement of both the State and the defendant and I will read you this advisory sentence

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

Case No. 81-5329

DAVID LIVINGSTON FUNCHESS,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 81-

DAVID LIVINGSTON FUNCHESS,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Respondent accepts the portion of the Petition for Writ of Certiorari setting forth the Questions Presented, the Citations to Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved found on Pages i and 1 of the Petition. In accepting the Questions Presented, Respondent does not accept any assumptions of law contained in the points as set forth.

QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER STANDARDLESS APPLICATION OF A MITIGATING CIRCUMSTANCE THAT "THE DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY" THAT BY STATUTE IS ONE OF THE SEVERAL FACTORS TO BE DETERMINATIVE OF THE SENTENCE CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN A SENTENCE OF DEATH IS IMPOSED,

-and-

WHETHER ARBITRARY APPLICATION FROM CASE-TO-CASE OF THE SAME MITIGATING FACTOR, RESULTING IN PREJUDICIAL APPLICATION TO THE PETITIONER, VIOLATES THE EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT.

II. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE FOR THE STATE TO PLACE THE BURDEN ON THE DEFENDANT TO PROVE BEYOND A REASONABLE DOUBT THAT HIS IS NOT A DEATH PUNISHABLE CRIME.

III. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SUPREME COURT OF FLORIDA HAS FASHIONED ADEQUATE RELIEF FOR VIOLATIONS OF GARDNER V. FLORIDA, AND WHETHER THE SUPREME COURT OF FLORIDA HAS ENGAGED IN RUBBER STAMP REVIEW OF DEATH SENTENCES REIMPOSED BY TRIAL JUDGES.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent accepts Petitioner's Statement of the Case to the extent that it is not argumentative and is supported by appropriate references to the record or that portion of the record that has been attached. Respondent would invite this Court's attention to the three decisions in the instant cause, Funchess v. State, 341 So.2d 762 (Fla. 1976); Funchess v. State, 367 So.2d 1007 (Fla. 1979); and Funchess v. State, 399 So.2d 356 (Fla. 1981) for an accurate recital of the facts presented at the trial court below and a history of the course said case has taken through the Florida appellate courts.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

On appeal from the re-imposition of two death sentences December 6, 1979, Petitioner argued eight points of appeal. Contained there, Petitioner asserted that the trial court erred in imposing the sentence of death because the aggravating circumstances were not shown to have outweighed the mitigating circumstances; that the aggravating circumstance found in Subsection (h) under § 921.141(5), Fla.Stat., had to be set aside or a new jury recommendation obtained because said jury was inadequately instructed on the law pertaining to the aggravating circumstances because no definition was given; that fundamental error occurred in that the penalty instruction given the jury stated that the aggravating and mitigating circumstances must be proven beyond a reasonable doubt; that fundamental error occurred because the jury was instructed that death

is presumed to be "the proper sentence" on a finding of any aggravating factor; that the jury was erroneously instructed regarding its consideration of certain factors in assessing certain aggravating circumstances; that the jury was given misleading instructions to the extent that it could only consider statutory mitigating circumstances; that the finding that the Petitioner committed the murders during the commission of a robbery resulted in an automatic aggravation of the offense for a felony which could have formed the basis for the conviction violated the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; and that in the interest of justice, a second advisory jury should have been impaneled for Petitioner's resentencing.

The Florida Supreme Court in resolving the issues raised by Petitioner in Funchess v. State, 399 So.2d 356 (Fla. 1981), concluded that as to whether there was sufficient evidence of aggravation to outweigh any mitigating factors in Petitioner's cause that:

> The only proper question now presented is whether there is substantial competent evidence to support the express findings of the trial judge that sentences of death are appropriate for Funchess. We are satisfied from our review of the evidence presented at the resentencing procedure, and from the record of the original sentencing proceeding; first, that the trial judge properly performed his weighing function with respect to one new mitigating circumstance developed at the resentencing proceeding and the aggravating factors which had been established at the original proceeding (all but one of which were unchallenged on remand); and second, that there was substantial and competent evidence to support the findings of the trial judge with respect to the aggravating and mitigating circumstances articulated in his resentencing order.
>
> The dictates of Gardner v. Florida

> have been faithfully met by the trial court in this case, and sentences of death were properly imposed . . .
>
> [399 So.2d at 356-357]

With regard to Petitioner's contention that "the jury was improperly instructed concerning the burden of proof of aggravating and mitigating circumstances in violation of the Fourteenth Amendment to the United States Constitution" [Petitioner's Petition, p.2], the court held:

> Funchess makes a number of legal attacks on the propriety of instructions given to the jury at the sentencing proceeding of his first trial, arguing that the order remanding for so-called "Gardner relief" should have included a mandate for reconvening an advisory jury. We reject all of these contentions. The purpose for our remand was to comply with dictates of the United States Supreme Court in Gardner v. Florida; was not to provide an entirely new sentencing proceeding at which a new advisory jury could be reconvened. Songer v. State, 365 So.2d 696 (Fla. 1978), cert.denied 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Complying with our mandate, the trial court properly rejected all legal points raised by Funchess' counsel.
>
> [399 So.2d at 356]

Respondent would therefore submit that as to Petitioner's second contention regarding the propriety of the jury instructions given during Petitioner's original jury sentencing consideration, the question was not properly before the Florida Supreme Court, and therefore, the merits of said claim were not reviewed by said Court.

Finally, as to whether the Florida Supreme Court is only providing a cursory review of Petitioner's re-imposed death sentences, Respondent would tender that this issue has never specifically been brought to the attention of the Florida Supreme Court. While Petitioner argued that in the interest of justice he was entitled to a new advisory sentencing

panel, and that the aggravating circumstances did not outweigh the mitigating circumstances, the question of whether the Florida Supreme Court had engaged in a rubber-stamp review of death sentences has not been litigated. See Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969).

REASONS FOR NOT GRANTING THE WRIT

I.

WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER STANDARDLESS APPLICATION OF A MITIGATING CIRCUMSTANCE THAT "THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY" THAT BY STATUTE IS ONE OF THE SEVERAL FACTORS TO BE DETERMINATIVE OF THE SENTENCE CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN A SENTENCE OF DEATH IS IMPOSED,

-and-

WHETHER ARBITRARY APPLICATION FROM CASE-TO-CASE OF THE SAME MITIGATING FACTOR, RESULTING IN PREJUDICIAL APPLICATION TO THE PETITIONER, VIOLATES THE EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT.

Petitioner first asserts that the trial court erred in not concluding that Petitioner had no "significant history of prior criminal activity" as found in § 921.141(6)(a), Fla.Stat. (1975) a statutory mitigating consideration. A review of Petitioner's Appendix G-29 and G-30, refutes said claim.

The trial court in the instant cause after resentencing proceeding, concluded in his sentencing order issued December 6, 1979, [G-27 through G-35] that Petitioner indeed had a

significant history of prior criminal activity which negated any mitigating circumstance in this regard. The Florida Supreme Court in reviewing same agreed.

In the face of said finding, Petitioner asserts not that said findings were erroneous, but rather, that "the mitigating factor of lack of a significant history of prior criminal activity has been applied in a standardless manner by the courts of the State of Florida resulting in substantial prejudice to this Petitioner." [Petitioner's Petition, p.3]. Citing to a number of capital cases, to-wit: Salvatore v. State, 366 So.2d 745 (Fla. 1978); Hargrave v. State, 366 So.2d 1 (Fla. 1978); Ross v. State, 386 So.2d 1191 (Fla. 1980); and Combs v. State, ___ So.2d ___ (Fla., Supreme Court Case No. 59,425, opinion filed July 30, 1981), Petitioner asserts that he was "denied any mitigating consideration of the same mitigating factor by the sentencing court although Petitioner had not previously been convicted of a felony, nor ever been sentenced to prison (Appendix G 3-4)." [Petitioner's Petition, p.4].

Respondent would submit that the Florida Supreme Court's decision in Washington v. State, 362 So.2d 658 (Fla. 1978) addressed the very issue of which Petitioner complains by acknowledging that, while it was necessary to demonstrate that a defendant had been convicted of crimes to serve as an aggravating circumstance, criminal activity was sufficient to negate the mitigating circumstance found in § 921.141(6)(a), Fla.Stat. The court held:

> We come now to Washington's assault upon the trial judge's sentence, alleging his failure to consider the presence of two mitigating circumstances specified by § 921.141(6), Fla.Stat. (1975), plus an additional circumstance which he maintains should have been considered in mitigation. He first assails the judge's failure to find the lack

> of a significant history of prior criminal activity. § 921.141(6)(a), Fla.Stat. (1975). However, it appears from the record, and was recognized by the trial judge, that Appellant had carried on a course of burglaries, had stolen property, for a significant period of time. In his confession in the Birk case, Appellant stated he had committed a series of burglaries around Dade County and had sold the stolen merchandise to Katrina Birk and her husband. He reiterated in open court that he was selling "hot merchandise" to Katrina Birk. Appellant asserts that under the rule announced in Provence, supra, previous convictions are required to negative § 921.141(6)(a). Washington misconstrues the holding in Provence. That case construed § 921.141(5)(b) which requires previous conviction of another capital felony involving the use or threat of violence. We held: clearly, the language of that subsection excludes the possibility of considering mere arrest or accusations as factors in aggravation." (emphasis supplied). 337 So.2d 786. Section 921.141(6)(a) makes no reference to conviction and, hence, Provence has no application to the instant case.
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> [362 So.2d at 666-667]

True to the guidelines as set forth in State v. Dixon, 283 So.2d 1 (Fla. 1973), Respondent would submit the trial court sub judice reviewed Petitioner's prior criminal activity and concluded that it was significant, and therefore, Petitioner was not entitled to the application of said mitigating circumstance in his case. Unlike Salvatore v. State, supra, Petitioner had been involved in more than just one burglary; unlike Hargrave v. State, supra, Petitioner's prior criminal activity consisted of both convictions and non-conviction; unlike Ross v. State, supra, Petitioner's admitted crimes were more than just "petty offenses"; and unlike Combs v. State, supra, Petitioner's prior criminal

activity developed from insignificant, petty offenses to admitted criminal activities of robbery, drug abuse, and theft.

While Respondent agrees that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and caprecious manner." Godfrey v. Georgia, 446 U.S. 420, 427 (1980), the application by the trial court and review by the Florida Supreme Court of the applicability of this statutory mitigating circumstance in Petitioner's case does not violate the spirit of Godfrey v. Georgia, supra.

Simply because Petitioner says its so is not borne out by the trial court's finding and the Florida Supreme Court's review of Petitioner's case. Petitioner has failed to come forth and demonstrate that trial court and the Florida Supreme Court in reviewing death penalty proceedings have applied a standardless review of this particular mitigating circumstance. As observed by the Florida Supreme Court in the instant cause:

> . . . We are satisfied from our review of the evidence presented at the resentencing procedure and from the record or the original sentencing proceeding: first, that the trial judge properly performed his weighing function with respect to the one new mitigating circumstance developed at the resentencing proceeding, and the aggravating factors which had been established at the original proceeding (all but one of which were unchallenged on remand) and second, that there was substantial and competent evidence to support the findings of the trial judge with respect to the aggravating and mitigating circumstances articulated in his resentencing order.

[399 So.2d at 357]

II.

WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE FOR THE STATE TO PLACE THE BURDEN ON THE DEFENDANT TO PROVE BEYOND A REASONABLE DOUBT THAT HIS IS NOT A DEATH PUNISHABLE CRIME.

Petitioner's second issue for review takes umbrage with the instruction given by the trial judge at the original sentencing proceeding regarding whether the jury must find beyond a reasonable doubt that mitigating circumstances exist. This particular issue was one of six issues presented to the Florida Supreme Court on appeal from the resentencing proceedings which was not a proper issue for review. See Songer v. State, 365 So.2d 696 (Fla. 1978) cert.denied 441 U.S. 956.

The Florida Supreme Court in remanding the cause to the trial court for review pursuant to Gardner v. Florida, 430 U.S. 349 (1977) limited the trial urt's review to allowing Petitioner to come forth and refute, modify, and present testimony regarding the pre-sentence investigation report utilized by the trial court at sentencing. Petitioner on appeal from said proceeding, attempted to argue matters which were not properly before the court regarding jury instructions which were given at the original sentencing proceeding. The Florida Supreme Court in rejecting the review of said claims, concluded:

> Funchess makes a number of legal attacks on the propriety of instructions given to the jury at the sentencing proceeding of his first trial, arguing that the order remanding for so-called "Gardner relief" should have included a mandate for reconvening an advisory jury. We reject all of these contentions. The purpose for our remand was to comply with the dictates of the United States Supreme Court in Gardner v. Florida; it was not to provide an entirely new sentencing proceeding at which a new advisory jury could be reconvened. Songer v. State,

365 So.2d 696 (Fla. 1978) cert. denied 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979). Complying with our mandate, the trial court properly rejected all legal points raised by Funchess' counsel.

[399 So.2d at 356]

In the instant cause, the propriety of jury instructions was not an issue for review and thus, no record was developed regarding the merits of said claim. Moreover, said issue is not a proper issue for certiorari review by this Court in that pursuant to Cardinale v. Louisiana, supra, the question of whether said instruction was appropriate or constitutionally infirm has not been addressed by a State trial tribunal or an appellate court. Therefore, until such time as Petitioner has appropriately brought the issue before a state court, this Court should decline review of Petitioner's complaint.

III.

WHETHER THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SUPREME COURT OF FLORIDA HAS FASHIONED ADEQUATE RELIEF FOR VIOLATIONS OF GARDNER V. FLORIDA, AND WHETHER THE SUPREME COURT OF FLORIDA HAS ENGAGED IN RUBBER STAMP REVIEW OF DEATH SENTENCES REIMPOSED BY TRIAL JUDGES.

Petitioner's last complaint urges that the Florida Supreme Court in formulating its procedure for review of possible Gardner v. Florida, supra, problems, has provided an inadequate proceeding "because neither the resentencing hearing nor the review of the newly imposed death sentence meets the standards articulated in Proffitt v. Florida, supra, because neither the sentencing proceeding

itself nor the review by the Florida Supreme Court are adequate to afford the defendant an adequate opportunity to be heard as to why he should not receive the death penalty." [Petitioner's Petition, p. 12]. Citing to Justice McDonald's dissenting opinion in Dougan v. State, 398 So.2d 439, 441 (Fla. 1981), Petitioner quotes: "Just because it is the same as a prior affirmed sentence does not necessarily make this one correct; it must pass constitutional muster on its own." [Petitioner's Petition, p. 12].

Petitioner argued to the Florida Supreme Court that in the interest of justice, another jury advisory sentencing proceeding was necessary. Specifically, he argued:

> The extensive mitigation shown by the evidence at the Gardner proceeding makes it imperative for another jury's advisory recommendation to be received by the trial court so that it may also be considered in determination of a proper sentence for these capital crimes.

The sole purpose for vacating the Petitioner's original sentence and remanding the case to the trial court for a second resentencing was predicated on Petitioner's complaint that a Gardner violation occurred, not that a multitude of errors occurred at the original sentencing proceeding. Indeed, a review of the trial record before the Florida Supreme Court in the instant cause reflects that Petitioner's trial counsel at the resentencing proceeding appreciated that the purpose for said proceeding was to allow Petitioner to refute, modify, or counter information contained in the pre-sentence investigation report used by the trial judge at sentencing.

The Florida Supreme Court in reviewing whether in the interest of justice, a new advisory sentencing proceeding should have been had pursuant to this Gardner

resentencing, again re-confirmed the purpose of said proceeding by concluding that the only issue for review was whether Petitioner had a full and fair opportunity to refute the pre-sentence investigation report used and to present testimony to do same. Therefore, the question raised by Petitioner in his third issue for review has never been an issue before either the state trial court or an appellate court for consideration. See Cardinale v. Louisiana, supra.

The Florida Supreme Court in an attempt to correct any possible Gardner v. Florida, supra, infirmities, in a number of cases including Petitioner's, vacated the death sentence and remanded the cause to the trial court for a new sentencing proceeding without an advisory jury being impaneled to allow Petitioner an opportunity to present evidence to the trial court which would refute information contained in the P.S.I. report. In Petitioner's case, the evidence presented to refute same and the decisional law which issued from the time of the original sentencing to the time of his second sentencing proceeding, resulted in modifications of the aggravating circumstances and mitigating circumstances found by the original trial court. The findings of fact by the trial court reflect same.

The Florida Supreme Court in reviewing the effect of the Gardner proceeding in Petitioner's case, reviewed the original trial sentencing proceeding and the new sentencing proceeding and concluded that the reimposition of the death penalty in the instant cause was based on the fact that the aggravating circumstances outweighed the mitigating circumstances that existed at the time of the second sentencing proceeding in 1979.

In Songer v. State, supra, the Florida Supreme Court addressed a similar issue as raised herein.

> On this appeal from resentencing, two points are raised. First, Appellant contends that the trial court erred in refusing to impanel a jury an conduct a new sentencing trial in accordance with § 921.141 Fla.Stat. (1975). It is the Appellant's review that when the United States Supreme Court vacated the Appellant's original sentence of death, the sentence was thereby rendered void. Appellant submits that any subsequent sentence, to be lawfully imposed must be preceded by another advisory sentencing before a jury under § 921.141, Fla.Stat. (1975). The State responds that both the United States Supreme Court and this Court intended that the case be remanded to the trial court for the very limited purpose of "consideration in light of Gardner v. Florida," Songer v. Florida, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 801 (1977). The state further asserts that the only question presented is whether the trial court complied with due porcess requirements of the Gardner decision which directs that when a court imposes a sentence of death, a defendant must have an opportunity to explain or rebut any information before the court on which the sentence is to be based.
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> * * *
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> We hold that the trial court did not err in refusing to impanel a jury upon resentencing or to hear witnesses in mitigation of the sentence and that the trial court properly complied with Rule 3.720(b) Fla.R.Crim.P. This Court's order of May 17, 1977, remanded the case to the trial court for resentencing "only consistent with the opinion of the Supreme Court of the United States in Gardner." Under that order, the case was remanded to the trial court to assure that the sentence was not imposed on the basis of any information which the Appellant did not have an opportunity to rebut or explain. The record now reflects there was no initial Gardner violation because trial counsel was given a copy of the

> pre-sentence investigation report prior to the original sentencing. The trial court on remand clarified the record by showing that Appellant's trial counsel had a copy of the presentence investigation at the first sentencing hearing. At the second sentencing hearing, the trial court also afforded Appellant's counsel another opportunity to challenge the accuracy of the same presentence investigation report. The only response was a request for a more expansive report.
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> [365 So.2d at 696]

In Florida, the advisory jury sitting in a capitol case never sees the pre-sentence investigation in that said report is not made available to an advisory sentencing jury. Indeed, in the Florida sentencing structure, the sentencer, to-wit: the trial judge, is the only one to consider the pre-sentence investigation in making a determination as to whether the jury's recommendation should be followed or dismissed. Therefore, a second advisory sentencing jury is not needed when, as in the instant case, a Gardner violation occurs, and a given defendant is given an opportunity to refute said report. See Songer v. State, supra.

Petitioner is attempting to do indirectly what he cannot do directly, to-wit: resurrect further mitigation which could or should have been presented to the sentencing jury at the time of his original sentencing proceeding. Couched in the language that, "the trial court reimposed death sentences but upon drastically different findings of fact," [Petitioner's Petition, p. 10], Petitioner attempts to seek a completely new expanded sentencing hearing based on his initial limited complaint that a judicial error, to-wit: a Gardner violation, occurred.

Petitioner has failed to make out a claim that he is entitled to this Court's review in question three of his Petition.

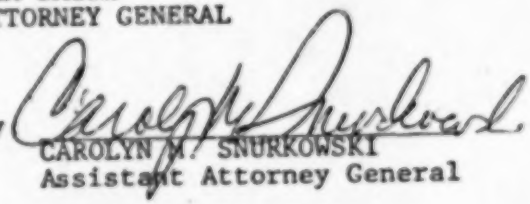
Further, Respondent would urge that the Florida Supreme Court's opinion speaks for itself with regard to the question of whether the Florida Supreme Court rubber stamps the reimposition of death sentences in Florida.

CONCLUSION

Petitioner raised three questions which urge review by this Court. Respondent would submit each fails to demonstrate review is necessary. Even couched in magical terms, Petitioner has failed to demonstrate that the Florida Supreme Court's procedures in addressing Gardner v. Florida infirmities suffers any constitutional deficiency. Therefore, Respondent would urge this Court to deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

By 
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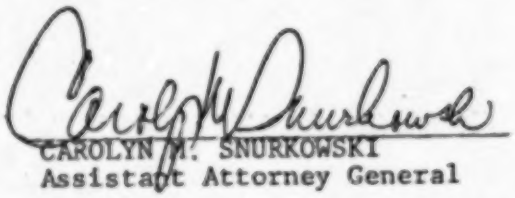
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished P. DOUGLAS BRINKMEYER, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302 via hand delivery on this 24th day of September, 1981.



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